IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 459

BENNIE LAZAROV, an individual d/b/a TENNESSEE METAL PRODUCTS COMPANY and LAZAROV BROS.,
Petitioner

v.

ARNOLD, SCHWINN & COMPANY,
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Your respondent, Arnold, Schwinn & Company, respectfully prays that the petition for writ of certiorari be denied.

ARGUMENT

SUMMARY OF ARGUMENT

This petition involves only a factual question on which the District Court and Court of Appeals made *concurrent findings of fact* (Petn. 7). The petition raises no question involving the construction of a Federal statute, nor is there any claim of conflict between Courts of Appeals upon any question of general importance. This case arose under the Sales Act of Tennessee which the lower courts have construed and applied in accordance with the decisions of the courts of Tennessee (R. 117). Thus, the petition for writ of certiorari should be denied under the rules and decisions of this Court.

PROPOSITION:

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED MERELY TO REVIEW EVIDENCE NOR TO DISTURB CONCURRENT FINDINGS OF FACT BY A DISTRICT COURT AND COURT OF APPEALS.

Houston Oil Company of Texas v. *Goodrich,*

245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140;

Southern Power Company v. *North Carolina Public Service Company,* 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164;

Missouri-Kansas-Texas Railroad Company v. *Texas,* 275 U. S. 494, 72 L. Ed. 391, 48 S. Ct. 82;

General Talking Pictures Corporation v. *Western Electric Company,* 304 U. S. 175, 546, 82 L. Ed. 1273, 58 S. Ct. 849;

Virginia Railway Company v. *System Federation No.* 40, 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592;

ARGUMENT

> The petition states that the *sole* question presented is: "Was there sufficient evidence adduced at the trial to require submission to the jury, under appropriate instructions, of the material issue as to whether petitioner refused respondent's offer to return the tubing upon respondent's rescission of the contract?" (Petn. 7).

Thus, the petition fails to state any justification under Rule 38, 5 (b) for the granting of a writ of certiorari. It discloses no question of importance upon which Courts of Appeals have reached different conclusions. The petition simply asks this Court to hear a private cause solely upon an issue of the sufficiency of the evidence which has been decided contrary to petitioner's contention by both the District Court and the Court of Appeals (D. C., R. 87, and C. C. A., R. 117).

The District Court, upon finding that there was no evidence of any refusal to accept the buyer's offer to return the defective goods, refused petitioner's requests for instructions numbered II, III, IV, V, and VI (R. 84-87) and thus properly refused to instruct the jury on issues irrelevant to the case made by the evidence. The Court of Appeals examined petitioner's contention with respect to his claimed refusal to accept a return of the goods and found, "* * * It does not appear that seller refused to accept the buyer's offer to return the goods" (Op. C. C. A., R. 117).

The Court of Appeals concurred in the District Court's view and held that the case was governed by Section 50 of the Uniform Sales Act (Sec. 7243 Tenn. Code) saying:

> "The controlling provisions here are those of Section 7262 (4), that seller shall be liable to pay to the buyer the price paid immediately after an offer to return the goods, and Section 7243, that the buyer, if he rightfully rejects the goods, need not return them. It is sufficient to notify the seller of the rejection." (Op., C. A., R. 117).

Subsequently, a petition to the Court of Appeals to rehear the cause was denied (R. 123).

In *Houston Oil Company of Texas* v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140, the petition for certiorari stated that the trial court had erred in refusing to submit certain questions of fact to the jury on the ground that there was not enough evidence in support of petitioners' claims to warrant a finding in their favor. The Circuit Court of Appeals reached the same conclusion.

This Court held that where the alleged errors consisted in refusing to submit certain questions to the jury and where the rulings of the District Court depended essentially upon an appreciation of the evidence and were concurred in by the Circuit Court of Appeals, that no writ of certiorari should be granted. Further, that if a writ of certiorari is improvidently granted, it will later be dismissed.

In the exercise of its discretionary jurisdiction this Court has consistently refused to grant the writ of certiorari merely to review evidence, and particularly is this the case when there have been concurrent findings on the part of the District Court and Court of Appeals on questions of fact. *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508, 68 L. Ed. 413, 44 Supreme Ct. 164; *Missouri-Kansas-Texas Railroad Company* v. *Texas*, 275 U. S. 494, 72 L. Ed. 391, 48 S. Ct. 82; *General*

Talking Pictures Corporation v. *Western Electric Company*, 304 U. S. 175, 546, 82 L. Ed. 1273, 58 S. Ct. 894; *Virginia Railway Company* v. *Systems Federation No.* 40, 300 U. S. 515, 81 L. Ed. 789, 57 S, Ct. 592;

The petition urges that a decision in this case is necessary in order to determine the duties of buyers and sellers under the Uniform Sales Act which is in force in many of the states. This contention ignores the fact that the Sales Act of Tennessee, applied by the District Court and Court of Appeals in this cause, is a local or state law. Under the controlling decisions of this Court, any questions as to the construction of this local or state law should be resolved by the courts of Tennessee. *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Supreme Ct. 817.

CONCLUSION

Respondent respectfully submits that the petition discloses on its face a compelling reason for its denial in that it raises only an issue of the sufficiency of the evidence upon which both the District Court and Court of Appeals have made findings contrary to petitioner's contention. Moreover, the petition discloses no question of general interest upon which there is a conflict among the Courts of Appeals, nor does it involve an issue as to the construction or constitutionality of any Federal statute, nor is there any intimation that a decision has been made which is in conflict with Tennessee decisions. The petition discloses only a desire on the part of petitioner to have a factual question reviewed by this Court after the entire cause has been adequately considered and adjudicated below.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

Hamilton E Little

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I, John S. Montedonico, one of the attorneys for respondent, hereby certify that I have this day personally delivered to Honorable Lovick P. Miles and Harry P. Rubert, attorneys for petitioner, a true copy of the foregoing reply with supporting brief.

This 15 day of January, 1951.

John S Montedonico